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Reflection on Forum Non Conveniens: Monde Re was Right?!?

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Several years ago, three United States Courts of Appeal contemporaneously dismissed actions to enforce foreign arbitral awards for lack of personal jurisdiction, a development that provoked expressions of concern from the arbitration bar. Adding to their dread, the United States Court of Appeal for the Second Circuit dismissed an enforcement action on forum non conveniens grounds in Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002). That decision continues to generate so much opposition that it was singled out for rejection in a draft of the Restatement of the U.S. Law on International Commercial Arbitration, which was publicly discussed at a continuing legal education program sponsored by the American Law Institute in May 2009. Having formerly held (but overcome) similar views, the author of this post reflects on the appropriate use of forum non conveniens doctrine in proceedings to enforce arbitral awards under the New York and Inter-American Conventions.

Because observers tend to forget, one should begin by recalling that Monde Re grew out of a dispute that led to elevated political tensions and raised concerns about energy security in Europe. According to Russia, Ukraine's state-owned gas concern had made significant, unauthorized withdrawals from pipelines carrying natural gas from Russia to Western Europe. Accepting the allegations as true, a reinsurer (Monde Re) covered the Russian losses and then (as subrogee) brought arbitration proceedings in Moscow against Ukraine's state-owned gas concern. One year later, the tribunal awarded Monde Re over $88 million by majority vote.

In due course, Monde Re brought enforcement proceedings in New York against Ukraine's state-owned gas concern and against the Ukrainian government, which was not a party to the underlying contract, had not been joined in the arbitration proceedings, and was not named in the award. As a result Monde Re's enforcement action did not represent a typical, summary proceeding against the award debtor. Monde Re, 311 F.3d at 500. To the contrary, it sought to establish the Ukrainian government's responsibility based on veil-piercing theories that were asserted in a politically volatile context and required complex examination of evidence located in East European capitals. Id. at 494-95, 500.

Given the circumstances just described, the Ukrainian government sought dismissal under the forum non conveniens doctrine, which affords U.S. courts the discretionary power to dismiss cases in the event that (1) there exists an adequate alternative forum, and (2) a combination of private and public interest factors outweighs the plaintiff's choice of a U.S. forum. After consideration, the district court granted the motion, and the Second Circuit affirmed. In so doing, the Court of

Appeals articulated two themes. First, it pointed out that (1) all parties were aliens, (2) who performed the underlying commercial transactions outside the United States, and (3) who resolved their differences through arbitration outside the United States. Monde Re, 311 F.3d at 500. Because those statements might apply to a very large range of enforcement actions under the New York and Inter-American Conventions (and might thus justify liberal use of forum non conveniens dismissals), they understandably provoked expressions of concern among the arbitration bar. Perhaps for that reason, this remains the theme that most observers associate with Monde Re.

Few people recall the Second Circuit's main theme, which emphasized that the circumstances did not contemplate summary enforcement proceedings against the award debtor, but the extension of liability to a third party based on theories that would require a complex inquiry into politically sensitive relationships documented by evidence located in foreign states, which clearly had stronger interests in the matter. Monde Re, 311 F.3d at 494-95, 500-01. Because that particular factual matrix cried out for the exercise of discretion and does not seem prone to frequent repetition, one may regard Monde Re as a sensible decision that confirms the utility of preserving a limited scope for forum non conveniens dismissals in enforcement proceedings under the New York and Inter-American Conventions.

Subsequent practice indicates that federal judges possess the acumen and restraint needed to apply the forum non conveniens doctrine sensibly in the context of enforcement proceedings. Most recently, in Figueiredo Ferraz Consultoria e Engenharia de Projeto Ltda v. Republic of Peru, 665 F. Supp. 2d 361 (S.D.N.Y. 2009), a firm of consulting engineers received a $21.6 million award against a Peruvian government sponsored program known as "Water for All." Subsequently, the firm commenced enforcement proceedings against the Republic of Peru in New York under the Inter-American Convention. Seeking to replicate the framework for Monde Re, Peru (1) claimed that the "Water for All" program was a separate legal entity, and (2) sought dismissal under the forum non conveniens doctrine.

Based on undisputed facts relating to the program's genesis, financing, management, and function, the court regarded it as a political organ inseparable from the Republic of Peru for purposes of enforcement proceedings under the Inter-American Convention. Figueiredo, 665 F. Supp. 2d at 368-71. With respect to forum non conveniens, the court observed that the private interest factors did not favor dismissal in the context of summary proceedings to enforce arbitration awards, which are heard as motions (as opposed to plenary actions) under the Federal Arbitration Act. Id. at 376, 378. Turning to the public interest factors, the court recognized that the United States has an interest in enforcing foreign arbitral awards under U.S. treaties against respondents who possess substantial assets within the forum. Id. at 376-77. Having previously observed that Peru issued some $13 billion worth of debt securities in New York over the previous seven years, the court saw no reason to dismiss an action brought for the sole purpose of enforcing an award against Peru's assets in that jurisdiction. Id. at 367, 373, 377.

Assuming that one can overcome visceral reactions to some of its unnecessarily broad language (described above as the first theme), Monde Re demonstrates that forum non conveniens dismissals may serve a constructive purpose in enforcement proceedings under the New York and Inter-American Conventions, albeit on rare occasions. Likewise, Figueiredo suggests that federal judges possess the insight needed to apply the doctrine in sensible ways. Under these circumstances, one feels the temptation to compare the forum non conveniens doctrine to kitchen knives: potentially dangerous, but useful and rarely mishandled.

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